

March 2012

Mandatory HIV Testing: An Orwellian Proposition

Kellie E. Lagitch

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

Recommended Citation

Lagitch, Kellie E. (1998) "Mandatory HIV Testing: An Orwellian Proposition," *St. John's Law Review*: Vol. 72 : No. 1 , Article 4.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol72/iss1/4>

This Note is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact seljbyc@stjohns.edu.

NOTES

MANDATORY HIV TESTING: AN ORWELLIAN PROPOSITION

The acquired immunodeficiency syndrome ("AIDS") epidemic descended upon an unsuspecting American public in the early 1980's,¹ its onset characterized by widespread ignorance, fear, and prejudice. At its inception, the disease was primarily associated with two classes of individuals: homosexuals and intravenous drug users.² This unfortunately led the majority of citizens to believe erroneously that the spread of the disease could be confined to these minority populations. Proponents of gay and lesbian rights, fearing further discrimination, called upon Congress and various state legislatures to enact legislation that would protect public health while providing those afflicted with AIDS or its causative agent, human immunodeficiency virus ("HIV"), the protections painstakingly guaranteed by the Constitution.³ These politicians responded accordingly and passed ex-

¹ See CENTERS FOR DISEASE CONTROL & PREVENTION, U.S. DEPT OF HEALTH & HUMAN SERVS., *Pneumocystis Pneumonia—Los Angeles*, 30 MORBIDITY & MORTALITY WKLY. REP. 250-52 (1981); CENTERS FOR DISEASE CONTROL & PREVENTION, U.S. DEPT OF HEALTH & HUMAN SERVS., *Update on Acquired Immunodeficiency Syndrome (AIDS)—United States 1982*, 31 MORBIDITY & MORTALITY WKLY. REP. 507-14 (1982); see also AIDS AND THE LAW § 1.2, at 3 (David W. Webber ed., 3d ed. 1997).

² See CENTERS FOR DISEASE CONTROL & PREVENTION, U.S. DEPT OF HEALTH & HUMAN SERVS., *Results of a Gallup Poll on Acquired Immunodeficiency Syndrome—New York City, United States*, 34 MORBIDITY & MORTALITY WKLY. REP. 513-14 (1985). "When asked, '[w]ho is the most likely to have AIDS?' one-half to two-thirds of all respondents mentioned homosexual men. In answer to the same question, N.Y.C. respondents were two to three times more likely to mention intravenous (IV) drug abusers" *Id.*; see also CHARLES PERROW & MAURO F. GUILLEN, *THE AIDS DISASTER* 1-10 (1990).

³ See Thomas B. Stoddard & Walter Rieman, *AIDS and the Rights of the Individual*, in *A DISEASE OF SOCIETY: CULTURAL & INSTITUTIONAL RESPONSES TO AIDS* 241, 256-63 (Dorothy Nelkin, et al. eds., 1991).

tensive legislation to ensure the confidentiality of both AIDS and HIV-related information in an effort to protect the constitutional rights of afflicted individuals.⁴

While society's ignorance regarding AIDS and HIV has dissipated in recent years, its prejudice regrettably has not. The plethora of medical, social, ethical, and legal implications surrounding the disease has led to the "resurgence of aggressive public health measures"⁵ as a means of combating the disease and the concomitant erosion of many of the privacy protections established in the early years of the epidemic. The sanctity of confidential HIV information, once deemed inviolable, has been severely diminished in the face of pressing public policy concerns as numerous states have attempted to reinstate intrusive public health disease control measures,⁶ thus posing "new threats to confidentiality."⁷ Foremost among these "new threats"⁸ are proposals to implement mandatory HIV testing for specific classes of individuals considered high risks of contracting or transmitting the disease.⁹ As such, women of child-bearing age, who currently comprise the fastest growing segment of the HIV-infected population in the United States, and their newborns, have been deemed primary candidates for mandatory testing.¹⁰ The subject of mandatory HIV testing, as it pertains to these particular groups, has raised numerous constitutional and statutory implications. Opponents of mandatory testing have alleged that such measures would violate numerous constitutional provisions in-

⁴ See Martha A. Field, *Testing for AIDS: Uses and Abuses*, 16 AM. J.L. & MED. 34, 49 (1990) (noting that by 1987 seventeen states enacted laws controlling disclosure of HIV-related information).

⁵ Roger Doughty, Comment, *The Confidentiality of HIV-Related Information: Responding to the Resurgence of Public Health Interventions in the AIDS Epidemic*, 82 CAL. L. REV. 111, 115 (1994).

⁶ Such measures include mandatory name reporting, partner notification, contact tracing, quarantine, and isolation. For a general discussion of these methods, see *id.* at 118-22.

⁷ *Id.* at 114.

⁸ *Id.*

⁹ See Steven Eisenstat, *An Analysis of the Rationality of Mandatory Testing for the HIV Antibody: Balancing the Governmental Public Health Interests with the Individual's Privacy Interest*, 52 U. PITT. L. REV. 327, 337-39 (1991) (discussing various proposals for mandatory HIV testing of groups who are at high risk of transmitting the disease and those who are at high risk of being exposed to the disease).

¹⁰ See Karen L. Goldstein, Note, *Balancing Risks and Rights: HIV Testing Regimes for Pregnant Women*, 4 CORNELL J.L. & PUB. POL'Y 609, 609 (1995) (noting that the number of women of child-bearing age infected with HIV is "increasing nearly four times as fast as men of that age").

cluding the Equal Protection Clause of the Fourteenth Amendment,¹¹ the Due Process Clause of the Fifth¹² and Fourteenth Amendments, the Fourth Amendment protection against unreasonable search and seizure,¹³ and the right to privacy, a right implicit within various constitutional guarantees enumerated in the Bill of Rights.¹⁴

Part I of this Note provides background information regarding pediatric AIDS as well as the proposed solution of mandatory testing. Part II begins with a brief overview of the origin of the constitutional right to privacy and then focuses on the development of the right to informational privacy and its role in HIV privacy jurisprudence. Part III commences with an analysis of the constitutionality of mandatory drug testing of employees and draws comparisons between such testing and mandatory HIV testing. Part IV reviews of proposals for the mandatory HIV testing of newborns and discusses the constitutional, social, and economic deficiencies of such proposals. Finally, Part V discusses the potential implications of validating the mandatory testing of newborns for HIV.

I. PEDIATRIC HIV: THE PUSH FOR MANDATORY TESTING

Sources estimate that by the year 2000 there will be ten million children worldwide infected with HIV.¹⁵ The United States, where approximately six to seven thousand infants are

¹¹ See U.S. CONST. amend. XIV, §1 ("No State shall ... deny to any person ... the equal protection of the laws.").

¹² See *id.* amend. V ("No person shall be ... deprived of life, liberty, or property, without due process of law").

¹³ See *id.* amend. IV ("The right of the people to be secure in their persons ... against unreasonable searches and seizures").

¹⁴ The Supreme Court recognizes that "[v]arious guarantees [in the Bill of Rights] create zones of privacy." *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965); see *Zablocki v. Redhail*, 434 U.S. 374 (1978) (marriage); *Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Loving v. Virginia*, 388 U.S. 1 (1967) (interracial marriage); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (marriage and procreation); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (parent/child relationships); see also *Planned Parenthood v. Casey*, 505 U.S. 833, 847 (1992) (noting "[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter"); cf. *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261, 279 (1990) (holding that a competent person has a "liberty interest" in refusing a possible life saving medical treatment). See generally JOHN E. NOWACK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.26, at 795 (5th ed. 1995); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-1, at 1302 (2d ed. 1988).

¹⁵ See TRACEY HOOKER, NATIONAL CONFERENCE OF STATE LEGISLATURES, HIV/AIDS FACTS TO CONSIDER: 1996, at 14 (1996).

born to HIV positive mothers each year,¹⁶ will account for a substantial percentage of that number. These children have little chance for survival and many will die before reaching their second birthday.¹⁷ Moreover, according to the Center for Disease Control, it costs approximately \$240 million a year to care adequately for these children, perhaps the most pitiable victims of the epidemic, infected through no fault of their own.¹⁸ These staggering figures have caused public uproar, leading many government officials to advocate coercive measures in an effort to remedy the problem and placate their constituents.¹⁹ Mandatory HIV testing of newborns, considered by many to be the most highly controversial of these measures, has moved to the forefront in recent years and as a result has been the subject of intense political debate.²⁰

The call for mandatory HIV testing has resounded throughout the country in the effort to stem the tide of pediatric AIDS cases.²¹ The majority of these cases are attributable to maternal-fetal, or perinatal transmission²² of the virus. These transmis-

¹⁶ See Goldstein, *supra* note 10, at 610.

¹⁷ See CENTERS FOR DISEASE CONTROL & PREVENTION, U.S. DEPT OF HEALTH & HUMAN SERVS., *U.S. Public Health Service Recommendations For Human Immunodeficiency Virus Counseling and Voluntary Testing For Pregnant Women*, 44 MORBIDITY & MORTALITY WKLY. REP. 1-15 (1995) (noting that ten to twenty percent of children perinatally infected with HIV die by age two).

¹⁸ See HOOKER, *supra* note 15, at 15.

¹⁹ See Eisenstat, *supra* note 9, at 327 (noting that "mandatory testing proposals have arisen largely as a public response, characterized by fear, frustration and anger at the disease itself and at those who have been infected").

²⁰ The intense political debate has been the subject of many law review articles. See generally Elizabeth B. Cooper, *Why Mandatory HIV Testing of Pregnant Women and Newborns Must Fail: A Legal, Historical, and Public Policy Analysis*, 3 CARDOZO WOMEN'S L.J. 13 (1996); Eisenstat, *supra* note 9; Doughty, *supra* note 5; Goldstein, *supra* note 10; Suzanne M. Malloy, Comment, *Mandatory HIV Screening of Newborns: A Proposition Whose Time Has Not Yet Come*, 45 AM. U. L. REV. 1185 (1996); see also Deborah L. Shelton, *Is it Time to Require HIV Testing for Pregnant Women, It Just May Be*, NEWSDAY, Dec. 23, 1996, at B13 (discussing "growing national debate ... centered on mandatory HIV testing of all pregnant women ...").

²¹ See Cooper, *supra* note 20, at 18 (noting that "legislation has been introduced in New York, Illinois, Michigan, Pennsylvania, Florida, among other states, and the U.S. Congress, that would result in the mandatory testing of newborns or pregnant women").

²² See Goldstein, *supra* note 10, at 612; see also HOOKER, *supra* note 15, at 15 (recognizing that HIV can also be transmitted to infants and children from a transfusion of infected blood and blood products or from sexual abuse by an infected person); Penelope Ploughman, *Public Policy versus Private Rights: The Medical, Social, Ethical, and Legal Implications of the Testing of Newborns for HIV*, 10 AIDS & PUB. POLY J. 182, 185 (1995-96) (stating that "[v]ertical transmission of HIV accounts for

sions can occur in any one of three ways: 1) in utero through the placenta; 2) during labor and delivery when the infant comes into contact with maternal blood and genital tract secretions; or 3) postpartum, through breastfeeding.²³ The recent development of AZT, a drug which has been shown to reduce perinatal transmission of HIV by as much as two-thirds (67.5 percent),²⁴ has caused a dramatic increase in support for these mandatory testing schemes. Proponents of mandatory testing have repeatedly emphasized and relied upon the potential benefits of AZT therapy when attempting to justify a state's infringement of the constitutional rights of prospective mothers through the implementation of mandatory testing programs.²⁵

Yet, of considerable import, is the fact that only fifteen to thirty percent of infants born to HIV-infected mothers will ultimately be infected.²⁶ While all newborns of infected mothers will initially test positive for HIV antibodies, approximately seventy to seventy-five percent of the infants will "sero-convert" within eighteen months after birth.²⁷ Consequently, the tests serve only as an accurate indication of the HIV status of the infants' mothers rather than that of the infants.²⁸ As a result, the testing

93.5% of pediatric HIV cases").

²³ See HOOKER, *supra* note 15, at 15; Goldstein, *supra* note 10, at 612.

²⁴ See HOOKER, *supra* note 15, at 47; Ploughman, *supra* note 22, at 183 (reporting a reduction in maternal transmission from 25.5% to 8.3%). *But see* Cooper, *supra* note 20, at 19 (discussing data from a clinical trial of perinatal use of AZT). The article states that "the significantly reduced transmission rates experienced in the trial are not expected to be fully replicated when women are faced with tangible concerns not present in the trial context, such as limited access to health care." *Id.*

²⁵ See Christina Kent, *AMA Reaffirms Mandatory HIV Testing in Pregnancy*, AM. MED. NEWS, Dec. 23, 1996, at 8, available in 1996 WL 11860597 (explaining how proponents of mandatory HIV testing state their view is correct ethically and scientifically because AZT decreases the likelihood of transmission from mother to child).

²⁶ See HOOKER, *supra* note 15, at 15. The statistics regarding maternal transmission often varied depending on the source. A transmission rate of approximately 25% was the most widely reported in the various sources.

²⁷ See Goldstein, *supra* note 10, at 612 n.16. "Seroconversion occurs when the blood (serum) changes (converts) from positive to negative in HIV antibody testing." *Id.*; see also Malloy, *supra* note 20, at 1190-91 (describing the inaccuracy of HIV tests in newborns). Malloy explains that the most commonly used tests, which detect the presence of HIV antibodies, rather than the virus itself, are ineffective in testing newborns, who can retain their mother's antibodies up until they reach six months of age. See *id.* Thus, "[a]ny antibodies to HIV detected in the newborn are necessarily the mother's, which have been transplacentally transmitted to the infant." *Id.* at 1191 (citations omitted).

²⁸ See Malloy, *supra* note 20, at 1191 ("When the antibody test is used, the

scheme is viewed by many as a pretense for the mandatory testing of pregnant women without their consent,²⁹ and as such, a violation of their constitutional rights, particularly their right to privacy.

II. THE CONSTITUTIONAL RIGHT TO PRIVACY

A. *Origins of the Right*

Although the Constitution does not explicitly provide for the right to privacy, the United States Supreme Court, through a series of cases,³⁰ has established that such a right is implicit within the various constitutional guarantees of the Bill of Rights.³¹ Since its initial mention in Justice Brandeis' dissenting opinion in *Olmstead v. United States*³² as "the right to be let alone,"³³ the right to privacy has permeated American jurisprudence.³⁴ The Supreme Court first officially recognized the right to privacy in the landmark decision of *Griswold v. Connecticut*.³⁵ In *Griswold*, the Court affirmatively established that the Bill of Rights of the Constitution inherently encompasses "zones of privacy," protecting individual citizens from unwarranted governmental intrusions into the most personal aspects of life.³⁶

mother's HIV status is revealed while the newborn's status remains in question.").

²⁹ See Ploughman, *supra* note 22, at 183 (referring to newborn testing as "indirect maternal testing").

³⁰ See *supra* note 14.

³¹ See MARTIN GUNDERSON ET AL., AIDS: TESTING AND PRIVACY 77 (1989) ("Privacy has been grounded by various Supreme Court justices in the First Amendment, the Fourth Amendment, the Ninth Amendment, and the Due Process Clauses of the Fifth and Fourteenth Amendments."); see also *supra* note 14.

³² 277 U.S. 438 (1928).

³³ *Id.* at 478 (Brandeis, J., dissenting). Justice Brandeis argued that "the right to be let alone [was] the most comprehensive of rights and the right most valued by civilized men" as envisioned by the framers of the Constitution. *Id.* In *Olmstead*, the majority of the Court stated that the Fourth Amendment was limited to "material" searches in holding that wiretapping was not unconstitutional. *Id.* at 464.

³⁴ See *Washington v. Glucksberg*, 117 S. Ct. 2258, 2267 (1997) (citing the long line of cases recognizing that in addition to freedoms expressly guaranteed by the Bill of Rights, the Due Process Clause recognizes fundamental liberty interests); see also *supra* note 14.

³⁵ 381 U.S. 479 (1965) (invalidating a Connecticut statute that criminalized the use of contraceptives by married persons).

³⁶ *Id.* at 484. The *Griswold* Court located this "zone[] of privacy" in the "penumbra" of the constitutional guarantees contained in the Bill of Rights. *Id.* The precise source of the right however remained open to interpretation for several years following the *Griswold* decision. Ultimately, the right was determined to be located within the Fourteenth Amendment's concept of personal liberty. See *Roe v.*

Since recognizing the right in *Griswold*, the Court has struggled with the task of defining its parameters. These struggles have ensued in the face of novel, and at times attenuated, contentions made by individuals asserting violations of their privacy rights.³⁷ As such, the right to privacy has proven to be "an elusive constitutional freedom,"³⁸ its precise scope subject to expansion and contraction since its acceptance in *Griswold*.³⁹ While matters pertaining to marriage,⁴⁰ family,⁴¹ and procreation⁴² have been specifically afforded constitutional privacy protection, the Court has refused to extend such protection to activities considered to conflict with the nation's history and traditions, such as homosexual activity.⁴³

In recent years, the right to privacy has been determined to encompass the right to make personal decisions regarding medical treatment, including the right to refuse such treatment altogether.⁴⁴ This aspect of the right of privacy is of particular relevance with regard to mandatory HIV testing since this privacy right should include the right to refuse knowledge regarding

Wade, 410 U.S. 113, 153 (1973); see also *Whalen v. Roe*, 429 U.S. 589, 598-99 n.23 (1977).

³⁷ See, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding that there is no constitutional right to engage in homosexual sodomy); *Kelley v. Johnson*, 425 U.S. 238 (1976) (refusing to allow a privacy claim to invalidate a regulation of hair length for policemen).

³⁸ Kevin J. Curnin, Note, *Newborn HIV Screening and New York Assembly Bill No. 6747-B: Privacy and Equal Protection of Pregnant Women*, 21 *FORDHAM URB. L.J.* 857, 869 (1994).

³⁹ See *id.* at 869-70 (describing the right to privacy as alternatively "the right to be let alone" ... the right to be free from "unwanted governmental intrusions into one's privacy" and a "substantive liberty" that should not be subjected ... to an "undue burden.") (citations omitted).

⁴⁰ See *Loving v. Virginia*, 388 U.S. 1 (1967) (finding a statute which prevented interracial marriages unconstitutional).

⁴¹ See *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (invalidating a state law banning distribution of contraceptives on grounds that it is an individual's right to decide whether to bear children or not).

⁴² See *Planned Parenthood v. Casey*, 505 U.S. 833, 869 (1992) (recognizing constitutional limitations on a state's right to interfere with a woman's decision regarding procreation and abortion); *Roe*, 410 U.S. 113 (holding that the right to privacy is broad enough to include a woman's right to decide whether or not to terminate her pregnancy).

⁴³ See *Bowers*, 478 U.S. 186 (holding that the right to privacy does not encompass the right to engage in homosexual sodomy because such activity has no roots in our nation's history and traditions). But cf. *Stanley v. Georgia*, 394 U.S. 557 (1969) (holding that a state cannot regulate the private possession of obscene materials).

⁴⁴ See *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261 (1990); *In re Quinlan*, 355 A.2d 647 (N.J. 1976).

one's HIV status, particularly in situations with minimum risk of HIV transmission.⁴⁵

B. *The Right to Privacy in Personal Information*

At least three strands of the multi-faceted right to privacy have been identified.⁴⁶ Of particular importance in the context of HIV and AIDS is the individual's right to informational privacy, a right which has been recognized, but which has never been clearly defined.⁴⁷ In *Whalen v. Roe*,⁴⁸ the first case to consider whether a fundamental right to informational privacy existed, the Court, drawing upon prior case law, identified two distinct aspects of the right to privacy: "the individual interest in avoiding disclosure of personal matters";⁴⁹ and "the interest in independence in making certain kinds of important decisions."⁵⁰ The *Whalen* Court was confronted with a New York law which required physicians to disclose to the State the names of those patients known by them to be recipients of specified prescription drugs.⁵¹ The names of such patients were stored in a central computer file at the Department of Health in Albany, which could only be accessed by a limited group of Department of Health employees.⁵² After weighing the State's "broad latitude in

⁴⁵ See *infra* notes 132-39 and accompanying text.

⁴⁶ See Goldstein, *supra* note 10, at 630. These include the fundamental right to privacy, the right to privacy of information and publication, and informed consent and the right to bodily integrity. See *id.* at 630-35.

⁴⁷ See Doughty, *supra* note 5, at 148 ("The Court has acknowledged, but has not clearly demarcated, a right to privacy in personal information."); see also Francis S. Chlapowski, Note, *The Constitutional Protection of Informational Privacy*, 71 B.U. L. REV. 133 (1991) (providing a general overview of the Court's decisions regarding the right to informational privacy).

⁴⁸ 429 U.S. 589 (1977).

⁴⁹ *Id.* at 599 (citing *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J. dissenting)); *Stanley v. Georgia*, 394 U.S. 557 (1969) (holding that the First Amendment protects private viewing of obscene materials).

⁵⁰ *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (citations omitted). The Court stated that, in *Paul v. Davis*, 424 U.S. 693, 713 (1976), it had identified "these decisions as [those] dealing with 'matters relating to marriage, procreation, contraception, family relationships, and child rearing and education.'" *Id.* at 600 n.26.

⁵¹ *Id.* at 591. The law was enacted as a means of evaluating the state's drug-control laws, found to be "deficient in several respects." *Id.* at 591-92. The drugs specified by the legislature and the New York State Department of Health as being subject to the reporting requirements were those considered to be potentially harmful or addictive under federal law, including opium, cocaine, methadone, amphetamines, and methaqualone. See *id.* at 593 n.8.

⁵² See *id.* at 593-94. "Public disclosure of the identity of patients is expressly prohibited by ... statute and by a Department of Health regulation." *Id.* at 594.

experimenting with possible solutions to problems of vital local concern⁵³ against the individual patient's interests in non-disclosure and autonomy, the Court concluded that "neither the immediate nor the threatened impact of the patient-identification requirements in the [statute] ... [was] sufficient to constitute an invasion of any right or liberty protected by the Fourteenth Amendment."⁵⁴ While the Court did uphold the law, it did so only after weighing the State's interest with the individual's privacy interest in personal medical information.⁵⁵

In *Nixon v. Administrator of General Services*,⁵⁶ decided in the same term as *Whalen v. Roe*, the Court "reiterated *Whalen's* recognition of the individual's interest in non-disclosure and formally enunciated the balancing test introduced in the earlier case."⁵⁷ This test essentially requires a court to weigh the public interest served by the statute against the effect of its intrusion on the privacy rights of individuals.⁵⁸

⁵³ *Id.* at 597.

⁵⁴ *Id.* at 603-04.

⁵⁵ See *id.* at 598-600. The *Whalen* Court concluded that this right to privacy was located within the ambit of the Fourteenth Amendment's right to personal liberty. *Id.* at 599 n.23. While the *Whalen v. Roe* Court recognized the privacy interests of these patients, it did not expressly articulate a fundamental right to privacy regarding personal medical information. The case, however, has often been cited as having done just that. See, e.g., *Kimberlin v. United States Dep't of Justice*, 788 F.2d 434, 438 (7th Cir. 1986) ("The Supreme Court in *Whalen v. Roe* ... recognized a constitutional interest 'in avoiding disclosure of personal matters.'") (citing *Whalen*, 429 U.S. at 599); *Plante v. Gonzalez*, 575 F.2d 1119, 1134 (5th Cir. 1978) (holding that the public is served by disclosure of a senator's financial statements though acknowledging "[t]he Supreme Court has clearly recognized that the privacy of one's personal affairs is protected by the Constitution"); see also *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 767 (1986) (furthering the theory that individuals must be afforded due process protection against government disclosure of personal information and stating that "Pennsylvania's [abortion] reporting requirements raise the specter of public exposure and harassment of women who choose to exercise their personal, intensely private, right, with their physician, to end a pregnancy"); *Barry v. City of New York*, 712 F.2d 1554, 1559 (2d Cir. 1983) (affirming that "privacy of personal matters is a protected interest").

⁵⁶ 433 U.S. 425 (1977) (rejecting privacy challenge by former President Nixon to a federal law authorizing seizure and examination of his documents and tape recordings for purposes of determining which ones were personal in nature and which ones were of historical value).

⁵⁷ *Curnin*, *supra* note 38, at 872.

⁵⁸ See *id.*; see also *Nixon*, 433 U.S. at 458. The *Nixon* Court, however, recognized that Nixon's privacy interests were not as great as the ones exerted in *Whalen*, citing such factors as the small fraction of records which were truly private in nature, the need for the screening process to determine which ones were truly private and the appellant's status as a public figure. *Id.* at 465.

Circuit courts have developed several criteria to assist the lower courts in implementing the *Whalen-Nixon* balancing test.⁵⁹ Foremost among these criteria are those developed by the Third Circuit in its opinion in *United States v. Westinghouse Electric Corp.*⁶⁰

The *Westinghouse* court assessed the constitutionality of a government study requiring employers to release confidential medical files of their employees to government officials conducting research designed to improve occupational health and safety.⁶¹ While the *Westinghouse* court recognized the existence of the right to informational privacy,⁶² it noted that the right was necessarily limited in scope stating that "the right of an individual to control access to her or his medical history is not absolute ... public health or other public concerns may support access to facts an individual might otherwise choose to withhold."⁶³ Thus, an individual's right in personal information is not an inviolable one, subject per se to constitutional protection. Rather, one commentary has noted that "once a privacy interest in certain information is identified, courts [must] weigh that interest against the interests supporting disclosure."⁶⁴ The complexity associated with this weighing of interests prompted the *Westinghouse* court to create a list of factors to be considered when determining whether the state's interest in disclosure outweighs the individ-

⁵⁹ See, e.g., *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997) (holding that the narrowness of the purpose for which the disclosed information will be used and whether the information is truly private or public are relevant factors in the balancing analysis); *United States v. Choate*, 576 F.2d 165, 182 (9th Cir. 1978) (holding that since the information on the exterior of envelopes passes through many hands, privacy interests are not implicated in such information); *Plante*, 575 F.2d at 1134-35 (recognizing the public interest concerns in the disclosure of financial information of elected officials).

⁶⁰ 638 F.2d 570, 572 (3d Cir. 1980) (reconciling "the privacy interests of employees in their medical records with the significant public interest in research designed to improve occupational safety and health").

⁶¹ *Id.* at 572-73. Here, the employer, Westinghouse, denied access of such records to officials of OSHA who were studying levels of hexahydrophthalic anhydride, a substance suspected of causing allergic reactions in plant employees. See *id.* at 572.

⁶² *Id.* at 577 (noting that the right to informational privacy extends to various interests).

⁶³ *Id.* at 578.

⁶⁴ Doughty, *supra* note 5, at 149. In delineating the standard of review, Doughty writes, "courts employ an intermediate standard of review, requiring more than a mere rational basis for the government's action but not subjecting that action to strict scrutiny." *Id.*

ual's right to privacy including:

[T]he type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.⁶⁵

After considering these various factors, the court ultimately found that the interest of employees in keeping information contained within their medical records private was outweighed by the government's interest in obtaining data relating to occupational health and safety.⁶⁶ Despite its holding in favor of the government, however, the court reiterated the position of the *Whalen* Court in acknowledging that the right to privacy could in fact be extended to cover the information contained in the medical records of individual employees.⁶⁷

These *Westinghouse* factors are of particular relevance when determining the legitimacy of mandatory testing and disclosure of HIV test results of newborns. While the unique implications of a positive test result would seem to militate in favor of the individual's right to privacy, the public policy concerns surrounding the disease may sway the opinion of the courts in the opposite direction, leading them to favor governmental interests as in *Westinghouse*.⁶⁸ As such, the balancing test emerges as an inadequate constitutional safeguard for mothers afflicted with the disease who may have subjected their offspring to the virus through vertical or perinatal transmission.

C. *HIV and the Right to Privacy*

The concept of a right to privacy regarding one's HIV status stems from the *Whalen* Court's recognition that certain personal information is constitutionally protected.⁶⁹ In addition, modern

⁶⁵ *Westinghouse*, 638 F.2d at 578.

⁶⁶ *See id.* at 580.

⁶⁷ *See id.* at 577 ("There can be no question that an employee's medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection.").

⁶⁸ *See supra* notes 60-67 and accompanying text.

⁶⁹ *See Doughty, supra* note 5, at 151 ("The same balancing test between the state and individual interests applies to cases concerning HIV-related information

courts repeatedly rely upon the balancing test regarding an individual's privacy right and the interests of the state, as applied in *Whalen*⁷⁰ and *Nixon*,⁷¹ in determining whether the disclosure of one's HIV status is constitutionally permissible.⁷²

The right to maintain the confidentiality of HIV status first arose within the prison context. In *Woods v. White*,⁷³ members of a prison medical staff disclosed to non-medical personnel and inmates that the plaintiff had tested positive for AIDS.⁷⁴ The federal district court for the Western District of Wisconsin held that an individual—even a prison inmate—possessed a “constitutional right to privacy in his medical records.”⁷⁵ The court found this to be especially true in the context of AIDS as a result of its common association with sexual activity and intravenous drug use.⁷⁶

Expanding upon the rationale of the *Woods* court, and bringing it out of the limited prison context, the court in *Doe v. Borough of Barrington*⁷⁷ asserted that the normal privacy interest in one's medical records was greater with respect to the AIDS virus because of the “stigma that attaches with the disease.”⁷⁸ Recognizing the extremely sensitive nature of AIDS, the *Barrington* court held that such information is constitutionally protected.⁷⁹ Many believe that this holding suggests that the right

as it does to other informational privacy cases.”).

⁷⁰ 429 U.S. 589, 597-98 (1977).

⁷¹ 433 U.S. 425, 465 (1977).

⁷² See Doughty, *supra* note 5, at 151.

⁷³ 689 F. Supp. 874 (W.D. Wis. 1988), *aff'd*, 899 F.2d 17 (7th Cir. 1990).

⁷⁴ *Id.* at 874.

⁷⁵ *Id.* at 876. The *Woods* court found that “[t]he right to privacy [was] not terminated by conviction for a crime.” *Id.*; see also *Doe v. Coughlin*, 697 F. Supp. 1234, 1237 (N.D.N.Y. 1988) (holding that a prisoner had a right to privacy in precluding prison officials from disclosing his HIV status to his fellow inmates without his consent). The court in *Doe* noted that “there are few matters of a more personal nature, and there are few decisions over which a person could have a greater desire to exercise control, than the manner in which he reveals [an AIDS] diagnosis to others.” *Id.*

⁷⁶ [G]iven the most publicized aspect of the AIDS disease, namely that it is related more closely than most diseases to sexual activity and intravenous drug use, it is difficult to argue that information about this disease is not information of the most personal kind, or that an individual would not have an interest in protecting against the dissemination of such information.

Woods, 689 F. Supp. at 876.

⁷⁷ 729 F. Supp. 376 (D.N.J. 1990).

⁷⁸ *Id.* at 384.

⁷⁹ *Id.* at 385. In addition, the court found that “[t]he right to privacy in this in-

to privacy should be afforded a more expansive interpretation when dealing with one's desire to keep HIV-related information confidential.⁸⁰

Approximately four years after *Barrington*, the Second Circuit articulated a broad interpretation of the right to privacy in *Doe v. City of New York*.⁸¹ The plaintiff in *Doe* alleged that the city violated his constitutional right to privacy for allegedly disclosing private information which lead to discrimination and embarrassment.⁸² Despite a confidentiality clause in the settlement agreement, the City of New York's Commission on Human Rights issued a press release describing the details of a settlement between Doe and Delta Airlines, the company that acquired Pan American Airlines during bankruptcy.⁸³ Doe had previously filed a complaint against Delta on the grounds that Delta did not hire Doe because of Doe's suspected HIV status.⁸⁴ The court found that the plaintiff's privacy rights had in fact been violated, stating that "[i]ndividuals who are infected with the HIV virus *clearly* possess a constitutional right to privacy regarding their condition."⁸⁵ The court characterized the right of privacy in this instance as a right to "confidentiality" in one's personal medical information⁸⁶ and found that the severe societal consequences accompanying disclosure of one's HIV status made the extension of the right not only logical, but necessary.⁸⁷ In addition to the Second Circuit, several other courts take the position that one's HIV status is constitutionally protected information.⁸⁸

formation extends to the members of AIDS patient's immediate family." *Id.* The court stated that family members of an AIDS patient "suffer from disclosure just as the victim does" and thus have a "substantial interest in keeping this information confidential." *Id.*

⁸⁰ See, e.g., *Missouri ex. rel. Callahan v. Kinder*, 879 S.W.2d 677, 679 (Mo. Ct. App. 1994).

⁸¹ 15 F.3d 264 (2d Cir. 1994).

⁸² *Id.* at 265.

⁸³ See *id.*

⁸⁴ See *id.*

⁸⁵ *Id.* at 267 (emphasis added).

⁸⁶ See *id.* The court's characterization of the right as one of confidentiality was done in order "to distinguish it from the right to autonomy and independence in decision-making" also identified in *Whalen*. *Id.*

⁸⁷ See *id.* ("An individual revealing that she is HIV seropositive potentially exposes herself not to understanding or compassion but to discrimination and intolerance, further necessitating the extension of the right to confidentiality over such information.").

⁸⁸ See, e.g., *Doe v. SEPTA*, 72 F.3d 1133, 140 (3d Cir. 1995) ("[T]here still exists

However, this clearly recognized privacy right can be overcome by a significant interest in disclosure.⁸⁹ For example, in the case of *In re Milton S. Hershey Medical Center*,⁹⁰ the court broached the subject of the unauthorized disclosure of the HIV-positive status of an obstetrics/gynecology resident to several of his colleagues and several hundred of his former patients.⁹¹ The resident, known by the court as "John Doe," failed to convince the court that the nature of the disclosure violated his right to privacy because it was unsubstantiated by a compelling need.⁹² The hospitals which employed Doe argued that there was in fact a compelling need to disclose.⁹³ Specifically, they claimed that such a limited disclosure was necessary in order to prevent transmission of the AIDS virus to patients, to "protect the other health [care] professionals from stigmatism and to alleviate any 'mass hysteria' that could result from a general disclosure."⁹⁴ After weighing Doe's privacy interests against the public's interest in disclosure, the court concluded that the hospitals acted within constitutional boundaries when disclosing Doe's HIV status without his consent.⁹⁵ The court stated that Doe's involvement in invasive procedures transformed his medical problem into a matter of "public concern the moment he picked up a surgical instrument and became a part of a team involved in [such] ... procedures."⁹⁶ Thus, while the court recognized the doctor's privacy right, it found that right to be overcome by the hospitals' interest in preserving the public health "regardless of the small potential for transmittal of the fatal virus."⁹⁷

a risk of much harm from non-consensual dissemination of the information that an individual is inflicted with AIDS."); *Cook v. American Nat'l Red Cross*, No. 97-1331-MLB, 1998 WL 46399, at *2 (D. Kan. Jan. 29, 1998) (recognizing the constitutional implications of involuntary disclosure). *But see* *Middlebrooks v. State Bd. of Health*, No. 191079, 1998 WL 4751, at *2 (Ala. Jan. 9, 1998) (holding that given the risk of the spread of AIDS, involuntary disclosure is not "an impermissible invasion of privacy.").

⁸⁹ See *Doughty*, *supra* note 5, at 151.

⁹⁰ 595 A.2d 1290 (Pa. Super. Ct. 1991), *aff'd*, 634 A.2d 159 (Pa. 1993).

⁹¹ *Id.* at 1291-93. The resident (pseudonym "John Doe") was working alternately between the Milton S. Hershey Medical Center and the Harrisburg Hospital at the time of the disclosure. As a result, his status was revealed to staff members and patients at both hospitals. See *id.*

⁹² See *id.* at 1296.

⁹³ See *id.* at 1293.

⁹⁴ *Id.*

⁹⁵ See *id.* at 1297.

⁹⁶ *Id.* at 1298 (emphasis omitted).

⁹⁷ *Id.* at 1297.

Disclosure can also outweigh privacy interests where an individual's HIV status is at issue in a legal proceeding. In *Doe by Doe v. Roe*,⁹⁸ the plaintiff lapsed into a coma and suffered severe neurological damage within three days of giving birth to her first child.⁹⁹ She was diagnosed as having thrombotic thrombocytopenia purpura ("TTP"). Some months later, the plaintiff tested positive for HIV.¹⁰⁰ In a suit for medical malpractice against her physician, the plaintiff deleted her HIV results from her medical records, despite an agreement to share such information.¹⁰¹ The court rejected the plaintiff's motion seeking a protective order, refusing to accept the argument that disclosure must be related to a public health or safety concern.¹⁰² So long as the probative value of evidence outweighs the prejudicial effect of that evidence, it is within a court's discretion to require that it be brought forward.¹⁰³

III. CONSTITUTIONALITY OF MANDATORY HIV TESTING

A. *Mandatory Drug Testing in the Workplace: A Precursor to the HIV Cases*

The constitutionality of mandatory testing first arose in areas outside the HIV context. In recent years, employee groups launched constitutional attacks on the ability of their respective government employers to institute mandatory drug testing programs as a condition precedent to their continued employment.¹⁰⁴

⁹⁸ 444 N.W.2d 437 (Wis. Ct. App. 1989). For cases applying an analysis similar to that of *Doe*, see *Lee v. Calhoun*, 948 F.2d 1162, 1165 (10th Cir. 1991) (declining to find a violation of privacy where a doctor revealed the patient's HIV status to the media during the pendency of a patient's malpractice action against a doctor); *Agosto v. Trusswal Sys. Corp.*, 142 F.R.D. 118, 120 (E.D. Pa. 1992) (finding limited disclosure of a patient's HIV status required when necessary to calculate lost earnings capacity of a patient in a suit brought by the plaintiff against his or her employer); *Tarrant County Hosp. Dist. v. Hughes*, 734 S.W.2d 675, 679 (Tex. App. 1987) (ordering a hospital to reveal names of blood donors to a plaintiff suing a hospital after receiving an infusion of HIV infected blood and having no other probable means of proving her case).

⁹⁹ *Doe*, 444 N.W.2d at 439.

¹⁰⁰ *See id.*

¹⁰¹ *See id.*

¹⁰² *See id.* at 441.

¹⁰³ *See id.* at 442.

¹⁰⁴ *See, e.g., National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (challenging a U.S. Customs Service drug screening program which required all employees seeking a transfer or a promotion to positions requiring the carrying

These employees have specifically alleged that such programs violate their expectations of privacy, grounded in the Fourth Amendment's protection against unreasonable search and seizure.¹⁰⁵ While the Court has acknowledged that mandatory blood and urine tests for purposes of determining drug use are "searches" within the parameters of the Fourth Amendment,¹⁰⁶ they have found such searches to be constitutionally permissible under the "special needs" doctrine articulated in *O'Connor v. Ortega*.¹⁰⁷

The leading cases upholding the constitutionality of mandatory employee drug testing are *Skinner v. Railway Labor Executives' Ass'n*¹⁰⁸ and *National Treasury Employees Union v. Von Raab*.¹⁰⁹ The complainants in *Skinner* brought suit challenging the railroad's policy of subjecting employees to mandatory blood and urine tests following major train accidents.¹¹⁰ In *Von Raab*, the petitioners, United States Customs employees, contested a Customs Department policy which required all Customs employees seeking promotion to positions in drug interdiction or positions requiring the use of firearms or classified materials to submit to mandated drug testing before they could be considered for such positions.¹¹¹ The Supreme Court upheld the mandatory

of firearms, or the handling of "classified" material, to submit to urinalysis); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (challenging a Federal Railroad Administration regulation requiring railroads to subject employees to blood or urine tests following certain major train accidents).

¹⁰⁵ See *National Treasury Employees Union*, 489 U.S. at 663; *Skinner*, 489 U.S. at 617.

¹⁰⁶ See *National Treasury Employees Union*, 489 U.S. at 663; *Skinner*, 489 U.S. at 617.

¹⁰⁷ 480 U.S. 709 (1987). The case involved the search of the desk and work area of a state hospital employee suspected of mismanagement. See *id.* at 712-14. The court held that a public employer's search would be considered reasonable where "substantial government interests in the efficient and proper operation of the workplace" outweighed the employee's privacy interests. *Id.* at 725. This balancing test employed by the Court has been identified in later cases as the "special needs" doctrine. *National Treasury Employees Union*, 489 U.S. at 666; *Skinner*, 489 U.S. at 620.

¹⁰⁸ 489 U.S. 602 (1989).

¹⁰⁹ 489 U.S. 656 (1989).

¹¹⁰ See *Skinner*, 489 U.S. at 617. The Federal Railroad Administration promulgated these regulations following its determination that alcohol and drug abuse by railroad employees posed a significant problem with respect to safety on the railroads. See *id.* at 606-08.

¹¹¹ See *Von Raab*, 489 U.S. at 660-61. The Commissioner of Customs, in mandating the drug testing, reasoned that these positions in the agency demanded drug free employees as they would face safety issues and life and death decisions. See *id.*

testing programs in both instances, finding that such testing clearly fell within the purview of the "special needs" doctrine delineated in the Court's Fourth Amendment jurisprudence.¹¹² In *Skinner*, the Court considered the railroad's interest in public safety to be a sufficient basis for the implementation of mandatory testing.¹¹³ The Supreme Court, in *Von Raab*, similarly treated as sufficient the interest of the Customs Department in ensuring that the physical and mental capabilities of Customs officials carrying firearms remained unimpaired by drug use.¹¹⁴

While the substance of these cases is markedly distinct from those pertaining to mandatory HIV testing, they are not entirely irrelevant. The "special needs" doctrine could be incorporated into the nation's HIV jurisprudence, providing some precedential value to courts addressing these issues.¹¹⁵ The government's in-

¹¹² See *id.* at 666 (stating that the purposes of the drug testing program are related to substantial interests presenting a special need); *Skinner*, 489 U.S. at 620-21 (stating that the safety of both the public and employees justifies prohibition on drug or alcohol use, and that monitoring is needed to assure compliance with prohibition).

¹¹³ *Skinner*, 489 U.S. at 620-21. The Court's application of the "special needs" doctrine in this context was contingent upon the assurances of the federal government that the testing program was adopted as a means of deterring accidents, rather than a means of providing evidence for the post-accident prosecution of employees. See *id.*

¹¹⁴ *Von Raab*, 489 U.S. at 672. The Court noted that "the Government has a compelling interest in ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment." *Id.* at 670. Additionally, "the public should not bear the risk that employees who may suffer from impaired perception and judgment will be promoted to positions where they may need to employ deadly force." *Id.* at 671.

¹¹⁵ See *Leckelt v. Board of Comm'rs of Hosp. Dist. No. 1*, 909 F.2d 820, 833 (5th Cir. 1990) (allowing HIV testing of hospital employees because the hospital's strong interest in maintaining a safe workplace outweighed the employee's privacy interest); *Love v. Superior Court*, 276 Cal. Rptr. 660, 662 (Ct. App. 1990) (upholding a statute mandating HIV testing for anyone convicted of soliciting prostitutes); *Johanna J. v. Municipal Court*, 267 Cal. Rptr. 666, 685 (Ct. App. 1990) (upholding a state statute requiring an HIV test of anyone charged with interfering with official duties of public safety employees through activities which may transfer blood or bodily fluids, from the defendant to the public safety employee). The court found a "special need" in allowing the test because the public has an interest in the health and safety of such officers. *Id.* at 683; see also Allison N. Blender, Note, *Testing the Fourth Amendment for Infection: Mandatory AIDS and HIV Testing of Criminal Defendants at the Request of a Victim of Sexual Assault*, 21 SETON HALL LEGIS. J. 467, 489 (1997) (noting that many agree that mandatory testing of sex offenders for HIV would be determined under "special needs"); Lisa Simotas, Note, *In Search of a Balance: Aids, Rape and the Special Needs Doctrine*, 66 N.Y.U. L. REV. 1881, 1898-99 (1991) (suggesting that HIV testing of rape defendants would meet the Supreme Court's parameters of a "special need").

terest in eliminating the spread of HIV would undoubtedly be considered a sufficient basis to invoke the application of the "special needs" doctrine. The subsequent use of the drug testing rationales formulated in *Skinner* and *Von Raab* by the nation's lower courts, however, has produced differing results,¹¹⁶ and may provide little assistance in examining the constitutionality of mandatory HIV testing programs. The *Whalen* balancing test must be applied consistently to be effective.

B. Mandatory HIV Testing

The subject of mandatory HIV testing has long been the topic of public outrage and debate. Initially, mandatory HIV testing sought to protect the nation's blood supply.¹¹⁷ Subsequently, mandatory testing was aimed at military personnel.¹¹⁸ In recent years, however, efforts by various state legislatures to expand mandatory HIV testing to specified groups in society, including health care workers, public employees, prisoners, and pregnant women and their newborns, have met with varying degrees of success. Many such proposals experienced intense opposition and public outcry, and as a result, "AIDS is this nation's most litigated disease[] ... present[ing] a wide range of issues not associated with other disabilities."¹¹⁹ Consequently, many courts recognize the "intensely personal and sensitive nature of HIV-related information"¹²⁰ and appreciate the plight of those afflicted

¹¹⁶ See, e.g., *American Fed'n of Gov't Employees v. Skinner*, 885 F.2d 884, 886 (D.C. Cir. 1989) (upholding the testing of those employed in positions deemed to impact public health and safety directly by the Department of Transportation); *National Fed'n of Fed. Employees v. Cheney*, 884 F.2d 603, 615 (D.C. Cir. 1989) (permitting random mandatory testing of civilian employees of the military occupying aviation, police guard, and drug counseling positions); *Brown v. City of Detroit*, 715 F. Supp. 832, 834-35 (E.D. Mich. 1989) (holding that the random testing of the city's police force did not violate the Fourth Amendment). But see *Harmon v. Thornburgh*, 878 F.2d 484, 496 (D.C. Cir. 1989) (striking down the random testing of Justice Department employees, except those holding top-secret national security clearances); *Transportation Inst. v. United States Coast Guard*, 727 F. Supp. 648, 658 (D.D.C. 1989) (rejecting the random testing of Coast Guard employees such as wipers and cooks as impairment from drug use would pose only a minimal public risk).

¹¹⁷ See GUNDERSON, *supra* note 31, at 39; see also 21 C.F.R. § 1270.5 (1997) (requiring that donated blood shall be tested for HIV).

¹¹⁸ See 32 C.F.R. § 58.4(b) (1997) (stating that it is Department of Defense policy to screen military personnel for HIV).

¹¹⁹ Penn Lerblance, *Legal Redress for Disability Discrimination: Bob, Carol, Ted and Alice Encounter AIDS*, 24 GOLDEN GATE U. L. REV. 307, 309 (1994) (discussing issues in employment and housing discrimination based on HIV status).

¹²⁰ Doughty, *supra* note 5, at 150; see also *Doe v. City of New York*, 15 F.3d 264,

with the disease who are seeking to maintain their privacy. Yet, despite this recognition, courts often afford states "particularly wide latitude" when evaluating measures designed to safeguard the public health.¹²¹

Few courts have been called upon to assess the constitutionality of mandatory HIV testing, and thus far the Supreme Court has managed to avoid consideration of the issue entirely. As a result, there is little consistency in the area, further complicating an already complex issue. Yet, in an attempt to invoke some semblance of consistency into this area, courts have drawn upon cases delineating a right to informational privacy.¹²² As such, the balancing test employed by *Whalen* and its progeny became a cornerstone in this area, providing assistance to those courts faced with these issues. Ultimately, the outcome of these cases turns on the question of whether a legitimate governmental interest in ensuring public safety outweighs that of the individual's privacy interest.¹²³

In a number of the cases, prisoners seeking to maintain the confidentiality of their HIV status have brought suit challenging the constitutionality of mandatory HIV testing.¹²⁴ Of particular

267 (2d Cir. 1994) (recognizing that there are certain health issues, such as AIDS, that are so personal that control over disclosure of infection should be greatly maintained by the individual); *Harris v. Thigpen*, 941 F.2d 1495, 1513 n.26 (11th Cir. 1991) (indicating that disclosure of information about AIDS is a sensitive and private matter); *Doe v. Coughlin*, 697 F. Supp. 1234, 1237 (N.D.N.Y. 1988) (acknowledging that "there are few matters of a more personal nature, and there are few decisions over which a person could have a greater desire to exercise control, than the manner in which he reveals that [AIDS] diagnosis to others").

¹²¹ See *Doughty*, *supra* note 5, at 152. Historically, courts considered states' actions in safeguarding public health in non-HIV related cases. See, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) (stating that the Court "has distinctly recognized the authority of a State to enact quarantine laws and 'health laws of every description' ... [to] protect the public health and the public safety") (quotation citation omitted in original); *Reynolds v. McNichols*, 488 F.2d 1378, 1382-83 (10th Cir. 1973) (upholding the states' power to treat a person suspected of having a venereal disease without that person's permission).

¹²² See *Whalen v. Roe*, 429 U.S. 589, 599 (1977) (stating that individuals have an "interest in avoiding disclosure of personal matters"); *Nixon v. Administrator of Gen'l Serv.*, 433 U.S. 425, 457 (1977) (recognizing a privacy interest in personal matters); *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (stating that people have "the right to be let alone"); *Barry v. City of New York*, 712 F.2d 1554, 1559 (2d Cir. 1983) (noting that there is a privacy interest in personal information that is to be protected).

¹²³ See *Skinner v. Railway Labor Executives' Assoc.*, 489 U.S. 656 (1989); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

¹²⁴ See *Anderson v. Romero*, 72 F.3d 518, 523 (7th Cir. 1995) (recognizing that prisoners do not have a privacy interest in their medical files); *Doe v. Wigginton*, 21

relevance in this area is *Harris v. Thigpen*.¹²⁵ In *Harris*, the prisoners brought suit challenging various policies and procedures of the Alabama Department of Corrections ("DOC").¹²⁶ Among these policies were the DOC's mandatory HIV testing of inmates and its segregation of those inmates whose tests proved to be seropositive.¹²⁷ The inmates claimed that such policies resulted in the nonconsensual disclosure of their HIV status, and thus were unconstitutional violations of their rights of privacy.¹²⁸ The Eleventh Circuit affirmed the finding of the lower court by holding that the involuntary testing and segregation of prison inmates was constitutionally permissible in light of the state's compelling interest in promoting safety and preventing the spread of AIDS within the prison system.¹²⁹

In contrast, the Ninth Circuit invalidated a similar prison testing program in *Walker v. Sumner*¹³⁰ due to the state's failure to articulate a legitimate governmental interest substantiating the need for such testing. The plaintiff in *Walker* alleged that by forcing him to submit to HIV testing by threatening to shoot him with "laser" guns, the prison guards deprived him of his constitutional rights.¹³¹ The court concluded that such forced testing was unconstitutional in light of the prison's failure to assert a

F.3d 733, 740 (6th Cir. 1994) (stating that disclosure of a prisoner's HIV infection did not violate the prisoner's privacy interests); *Woods v. White*, 689 F. Supp. 874, 877 (W.D. Wis. 1988), *aff'd*, 899 F.2d 17 (7th Cir. 1990) (holding that the unjustified disclosure of a prisoner's HIV status to non-medical staff violated the prisoners' right to privacy); *Baez v. Rapping*, 680 F. Supp. 112, 116 n.6 (S.D.N.Y. 1988) (noting that the right to segregate prisoners with HIV had been upheld against First, Eighth, and Fourteenth amendment challenges) (citing *McDuffie v. Rikers Island Med. Dep't*, 668 F. Supp. 328, 330 (S.D.N.Y. 1987)).

¹²⁵ 941 F.2d 1495 (11th Cir. 1991).

¹²⁶ *Id.* at 1498. In an attempt to confront the AIDS epidemic that infiltrated prisons, Alabama passed a statute that required all persons sentenced to prison in Alabama to be tested for sexually transmitted diseases upon entry and prior to release. *See id.* at 1499 n.2.

¹²⁷ *See id.* at 1500.

¹²⁸ *See id.* at 1512. The court noted that attacking disclosure on the right to privacy forces it to enter an uncertain area of law. *See id.* at 1512 n.25 (citing *Doe v. Coughlin*, 697 F. Supp. 1234, 1236 (N.D.N.Y. 1988)).

¹²⁹ *See id.* at 1521. The state's compelling interest was predicated in part on the fact that high-risk behaviors, such as homosexual relations, IV drug use, tattooing, and frequent fighting occur "disproportionately in prison systems." *Id.* at 1519-20.

¹³⁰ 917 F.2d 382 (9th Cir. 1990).

¹³¹ *Id.* at 385. Specifically, the prisoner asserted that the involuntary AIDS test constituted an unreasonable search and seizure in violation of his Fourth Amendment right, as well as violating his Eighth and Fourteenth Amendment rights. *See id.* at 384-85.

"legitimate penological objective" in support of such testing.¹³²

The governmental interests considered by the courts, in upholding the implementation of mandatory HIV testing programs in prisons have not been confined to that context alone. Rather, courts have recognized these interests as justifying mandatory testing of public employees, which arguably contravenes their privacy rights. Consider *Anonymous Fireman v. City of Wilmoughby*,¹³³ where a firefighter challenged the City's ability to implement routine mandatory HIV testing of firefighters and paramedics as part of their annual physical examinations.¹³⁴ The district court rejected the plaintiff's contentions that the testing program violated both his Fourth Amendment right as well as his privacy rights, holding that "mandatory testing may be ordered for high-risk government employees such as firefighters and paramedics."¹³⁵ The court reasoned that the City had a legitimate interest in promoting and preserving the safety of its citizens which outweighed the plaintiff's privacy interest.¹³⁶

However, the Eighth Circuit struck down a similar mandatory HIV testing program in *Glover v. Eastern Nebraska Community Office of Retardation*.¹³⁷ The employees of a multi-county health services agency, the Eastern Nebraska Community Office of Retardation ("ENCOR"), brought suit to enjoin enforcement of a policy of the Eastern Nebraska Human Services Agency ("ENSHA") requiring the employees to submit to mandatory testing for HIV.¹³⁸ ENSHA, dedicated to serving the needs of the

¹³² See *id.* at 386 ("In the instant case, defendants have introduced absolutely no evidence to suggest that the mandatory AIDS test ... was based on a legitimate penological objective.").

¹³³ 779 F. Supp. 402 (N.D. Ohio 1991).

¹³⁴ See *id.* at 408. HIV testing was to be part of annual physical examinations which certify the firefighters' fitness for duty. See *id.*

¹³⁵ *Id.* at 418. The court specifically noted, however, that the holding in the case was strictly limited and was not meant to stand for "the general proposition of mandatory testing of all employees for AIDS, whether they be public or private, or mandatory testing for AIDS of the general public." *Id.* The court considered that public service industries such as the police and fire departments are highly regulated with respect to an employee's performance. See *id.* at 415 (citing *Penny v. Kennedy*, 915 F.2d 1065, 70 (6th Cir. 1990) (Wellford, J., concurring) (recognizing that the nature of the police department requires strong regulation to ensure the safety of both the public and the police department)).

¹³⁶ See *id.* at 416. The court noted that the governmental interests include safety for the employer and the public, continued fitness for duty of its employees, and preventing the spread of the AIDS virus. See *id.*

¹³⁷ 867 F.2d 461 (8th Cir. 1989).

¹³⁸ See *id.* at 462. The policy was to test employees with direct client contact for

mentally disabled, asserted that such testing was necessary in order to prevent the transmission of HIV from workers to clients "who engage in violent or aggressive behavior associated with their conditions, such as biting and scratching"¹³⁹ The court weighed the employees' rights to be free from unreasonable searches and seizures against the protection mandatory testing would afford.¹⁴⁰ Since the risk of transmission was slight, the mandatory test could not be justified, and thus it violated the employees' constitutional rights.¹⁴¹

Although there is some disparity in the results of these cases, the courts have consistently employed the *Whalen* balancing test. Moreover, the outcome has always depended upon whether the states' interest in the disclosure of a person's HIV status outweighs the individual person's right to privacy. As such, this test becomes highly relevant in the subsequent analysis regarding the legitimacy of mandatory HIV testing schemes for newborns and pregnant women.

IV. MANDATORY TESTING FOR NEWBORNS AND PREGNANT WOMEN: CROSSING THE LINE OF CONSTITUTIONALITY

The unprecedented number of newborns infected with the HIV virus earlier this decade forced legislatures to examine the viability of existing HIV testing policies.¹⁴² Currently, forty-five states have implemented programs which provide for the anonymous testing of newborns for HIV.¹⁴³ Test results are used

HIV and hepatitis B virus so as to attain a safe environment for both employees and clients. *See id.*

¹³⁹ *Id.* at 463.

¹⁴⁰ *See id.* (citing *O'Connor v. Ortega*, 483 U.S. 709 (1987) (parallel citations omitted)).

¹⁴¹ *See id.* at 464 ("Because the risk of disease transmission has been shown to be negligible in the ENCOR environment, ENSHA's articulated interest in requiring testing does not constitutionally justify requiring employees to submit to a test for the purpose of protecting the clients from an infected employee."). *But see* *Leckelt v. Board of Comm'rs of Hosp. Dist. No. 1*, 909 F.2d 820, 833 (5th Cir. 1990) (upholding HIV testing of a nurse despite the low probability of transferring HIV to a patient); *Johnetta v. Municipal Court*, 267 Cal. Rptr. 666, 685 (Ct. App. 1990) (upholding HIV testing of a defendant who bit a police officer although transmission of HIV through saliva is low).

¹⁴² *See Study in Babies With HIV Suggests Early Treatment May Slow Virus*, L.A. TIMES, May 8, 1997, at B2 (suggesting early diagnosis and treatment may inhibit the AIDS virus). *But see More Women With AIDS Virus Are Having Babies*, SEATTLE TIMES, June 18, 1997, at A5 (highlighting a decrease in the former epidemic-level HIV-infected birth rates and an improvement in statistics overall).

¹⁴³ The five states which do not engage in the "blind" testing of newborns for

for strictly statistical purposes and are not revealed either to the infant's physician or his or her parents. Many view such testing as a failure on the part of the government to insure the best interests of our country's children.¹⁴⁴ In an effort to rectify this perceived inadequacy on the part of the government and to reduce the number of pediatric AIDS cases, various state legislatures, as well as members of Congress, have introduced mandatory testing proposals for newborns.¹⁴⁵ Proponents of mandatory testing assert that such testing is justified despite its impact on the mother's constitutional rights. Knowledge of the infant's HIV status would allow for early intervention and treatment, enhancing the quality and duration of the child's life, and possibly prolonging it until a cure is discovered.¹⁴⁶ These advocates view early intervention and diagnosis as "essential in maximizing the benefits of available treatments."¹⁴⁷ Additionally, proponents contend that mandatory testing will foreclose the possibility of an unidentified infant leaving the hospital without the opportunity for early treatment.¹⁴⁸

However, despite the emotional appeal of this position, the highly critical opponents of mandatory testing continue to assert the unconstitutionality of such testing.¹⁴⁹ While these opponents

HIV are Idaho, Nebraska, South Dakota, North Dakota, and Vermont. See Nat Hentoff, *Sweet Land Of Liberty - Privacy That Kills*, WASH. POST, Apr. 8, 1995, at A19.

¹⁴⁴ Cf. 143 CONG. REC. H817-01, at H817 (daily ed. Mar. 11, 1997) (statement of Rep. McGovern); 135 CONG. REC. E2825-02, at E2827 (daily ed. Aug. 3, 1989) (statement of Dannemeyer). See generally Eric J. Kupeman, Note, *The Mark of Cain: No Second Chance for Teachers Convicted of Sex Offenses Against Students*, 3 CARDOZO WOMEN'S L.J. 491, 520 (1996) (addressing children's best interests).

¹⁴⁵ See *Molinari Bill Would Use Block Grant For Infant Drug Testing*, ALCOHOLISM & DRUG ABUSE WKLY., June 30, 1997, at 1 (proposing the use of block grant funds to perform mandatory drug and alcohol testing of newborn children).

¹⁴⁶ See Leonardo Renna, Note, *New York State's Proposal To Unblind HIV Testing For Newborns: A Necessary Step In Addressing A Critical Problem*, 60 BROOK. L. REV. 407, 415-17 (1994).

¹⁴⁷ *Id.* at 416. Among the purported benefits of early treatment and intervention are the "administration of prophylaxis, antiretroviral drugs, intravenous immunoglobulin, specialized immunization schedules and close nutritional monitoring." *Id.* at 416-17. For a more complete description of these benefits and their various positive effects, see *id.* at 417-20.

¹⁴⁸ See Goldstein, *supra* note 10, at 619.

¹⁴⁹ Cf. Nina Loewenstein, *Mandatory Screening of Newborns for HIV: An Idea Whose Time Has Not Yet Come*, 3 CARDOZO WOMEN'S L.J. 43, 43 (1996). The author argued that the benefits of testing did not justify mandatory testing, stating that [P]roponents of mandatory [HIV] testing tend to 1) overstate the medical benefits of universally testing infants for HIV at birth; 2) minimize the impact of the HIV test for the woman herself, and her legal rights concerning

are quick to point out the mother's constitutional rights of privacy, equal protection, and due process,¹⁵⁰ they do not predicate their analysis solely on these constitutional principles. Of particular significance is the argument that "the social stigma accompanying a positive HIV test would discourage mothers from seeking prenatal care, which is generally considered the best protection against HIV perinatal transmission and the most effective means of ensuring the health of the child."¹⁵¹ The opponents contend that the imposition of mandatory testing schemes will foster distrust among patients, thereby alienating the mother from the health care system.¹⁵² It is in the midst of this ongoing and often heated debate that the legislatures of various states, as well as the United States Congress, have promulgated legislation calling for the implementation of mandatory testing policies, adding fuel to a fire already burning out of control.¹⁵³

A. *Summary of Legislative Proposals for Mandatory Testing of Newborns*

Proposals for the mandatory testing of newborns for HIV have been advanced by both state and national government officials and have taken on a variety of forms.¹⁵⁴ Among the most contested of these proposals was one introduced by New York Assemblywoman Nettie Mayersohn. Mayersohn's proposal sought to change the practice of New York's Newborn HIV Sero-prevalence Survey, conducted by the State since 1987 to anonymously trace the HIV epidemic in New York's newborns.¹⁵⁵ In its

HIV testing; and 3) minimize the importance of the mother's role in facilitating medical care for her infant as well as question her competence as the infant's caretaker.

Id.

¹⁵⁰ See GUNDERSON, *supra* note 31, at 38-40, 82-87.

¹⁵¹ Goldstein, *supra* note 10, at 619. "[M]andatory testing may cause a backlash in some cases and result in women avoiding natal assistance altogether." *Id.* at 620.

¹⁵² See Goldstein, *supra* note 10, at 619.

¹⁵³ See Dennis Farney, *Test of Faith: Three GOP Freshmen Advance Agenda, Even as Revolution Falters Congressmen Share Prayer, Distaste for Washington, and Doubts on Gingrich*, WALL ST. J., Oct. 28, 1996, at A1, A8 (explaining the use of federal funds as leverage to mandate HIV-testing of newborns); Christina Kent, *States Pushed to Test Newborns for HIV*, AM. MED. NEWS, May 27, 1996, available in 1996 WL 7990346 (addressing the Senate and the House of Representatives' agreement to implement mandatory HIV testing).

¹⁵⁴ See *supra* notes 140-43 and *infra* notes 153-62.

¹⁵⁵ See Julie D. Levinson, Note, *While Ignorance May Not Be Bliss, It Is A Mother's Right: Constitutional Implications of Testing Newborn Babies For HIV*, 3 CARDOZO WOMEN'S L.J. 71, 71-73 (1996).

initial form, Mayersohn's proposal mandated HIV testing for all babies born in the State and the disclosure of all positive results to the infant's mother.¹⁵⁶ The proposal did not require maternal consent prior to testing, but did include mandatory disclosure of the test results to the mother.¹⁵⁷ The multitude of constitutional implications associated with the bill led to its defeat in 1993, 1994, and 1995. The bill was extensively modified in 1996 in an effort to ensure its passage with the true intent of the bill masked in ambiguous language.¹⁵⁸ The bill as modified was ultimately passed in June of 1996.¹⁵⁹ The law is worded broadly enough to authorize mandatory testing without expressly providing for such.¹⁶⁰

At least two state legislatures have considered bills similar to that of New York.¹⁶¹ At the national level, the Ryan White Care Amendments were adopted by the United States Congress in May of 1996.¹⁶² The final draft represents a compromise between the divergent viewpoints of those in favor of mandatory testing and those opposed.¹⁶³ The amendments call for a program which will encourage pregnant women to submit voluntarily to HIV testing.¹⁶⁴ However, if the voluntary effort should fail, the amendments may be modified to mandate "that all newborns whose biological mother has not undergone prenatal testing for

¹⁵⁶ See N.Y. Assembly 6684-B, 218th Gen. Assembly, 1st Sess. (N.Y. 1995).

¹⁵⁷ See *id.*

¹⁵⁸ See N.Y. PUB. HEALTH LAW § 2500-f (McKinney 1997).

¹⁵⁹ See *id.*

¹⁶⁰ See *id.* The law as enacted reads in part:

In order to improve the health outcomes of newborns, and to improve access to care and treatment for newborns infected with or exposed to human immunodeficiency virus (HIV) and their mothers, the commissioner shall establish a comprehensive program for the testing of newborns for the presence of human immunodeficiency virus and/or the presence of antibodies to such virus.

Id.

¹⁶¹ See S.B. 2314, 13th Leg., 2d Sess. (Fla. 1994) (providing that mothers of newborn infants be informed of the HIV test results in a post-test counseling session); A.B. 881 Cal. Leg., Reg. Sess. (1997-98) (mandating the disclosure of any positive result to the newborn's parent(s) or guardian(s)). The Florida bill was ultimately defeated, and the California statute is still under consideration.

¹⁶² See Ryan White CARE Act Amendments of 1996, Pub. L. No. 104-146, 110 Stat. 1346 (1996) (codified in scattered sections of 42 U.S.C.A. 300ff (West Supp. 1997)).

¹⁶³ See Helen Dewar, *AIDS Testing Compromise Is Reached; Hill Negotiators Agree On Prenatal Program*, WASH. POST, May 2, 1996, at A9.

¹⁶⁴ See *id.*

HIV, be tested for HIV at birth and that the results be made available to the biological mother or guardian of the infant."¹⁶⁵ If mandatory testing becomes necessary, failure to adhere to these requirements would render a state ineligible for federal funding.¹⁶⁶ While such funding would provide a strong incentive to adhere to the requirements, in the event that voluntary testing efforts fail, strong opposition may make enforcement impossible.

The defeat of the majority of the legislative measures appears indicative of the view that mandatory testing is repugnant both to constitutional ideals of privacy and freedom. In light of these principles, perhaps the New York bill and the federal legislation are little more than political victories for their sponsors, with no cognizable benefits flowing to the nation's HIV-infected infants.

B. The Constitutional Quagmire Surrounding Compulsory Testing of Newborns

Mandatory HIV testing of newborns raises important issues regarding a mother's constitutional rights,¹⁶⁷ foremost of which is the violation of the right of privacy.¹⁶⁸ Although the right to privacy is not absolute,¹⁶⁹ it is considered to be fundamental.¹⁷⁰ Accordingly, a compelling state interest, with narrowly tailored means to achieve that interest, must justify any privacy right infringements.¹⁷¹ Whether a measure satisfies the criteria depends upon whether the interests of the state outweigh the individual's

¹⁶⁵ S. REP. NO. 104-25, at 45 (1996), reprinted in 1996 U.S.C.C.A.N. 989, 1033.

¹⁶⁶ See *id.*

¹⁶⁷ See Shelton, *supra* note 20, at B13 (recognizing the view that "mandatory disclosure violates privacy and amounts to mandatory testing of the mothers").

¹⁶⁸ See generally Levinson, *supra* note 153, at 75-93 (discussing the Court's fashioning of a fundamental right of privacy). For a general discussion of the right of privacy, see TRIBE, *supra* note 14, §§ 15-1 to 15-10, at 1302-62.

¹⁶⁹ See *Roe v. Wade*, 410 U.S. 113, 154 (1973) (stating that the right of privacy "is not unqualified and must be considered against important state interests in regulation").

¹⁷⁰ See *id.*; see also *Loving v. Virginia*, 388 U.S. 1 (1967) (finding a fundamental right of privacy in the marital relationship); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (supporting a fundamental right of privacy in use of contraceptives by married persons).

¹⁷¹ See Privacy Act of 1974, Pub. L. No. 93-579, § 3418, 88 Stat. 1896 (codified at 5 U.S.C. 522a (1994)) ("The right to privacy is a personal and *fundamental* right protected by the Constitution of the United States[.]") (emphasis added). See generally TRIBE, *supra* note 14, §§ 11-3 to 11-4, at 774-80, §§ 15-1 to 15-10, at 1302-62.

privacy interests in autonomy, dignity, and confidentiality.¹⁷²

1. The State's Authority For Implementation of Mandatory Testing: To Protect State Interests

A court, in determining the constitutionality of mandatory newborn HIV testing, must balance the state's interests in preserving public health against the mother's privacy interests. The state's interest must satisfy the compelling interest test in order to warrant an invasion of the mother's privacy. The compelling state interest in mandatory HIV testing is to protect public health generally and the infant's health specifically.¹⁷³ Grounds to justify state attempts at mandatory testing include the Tenth Amendment "police powers"¹⁷⁴ the "*parens patriae*" doctrine,¹⁷⁵ and the "best interests of the child" analysis.¹⁷⁶

The Tenth Amendment, reserving for the state those powers not delegated to the federal government, grants the state the legislative authority to protect the public health and welfare.¹⁷⁷ The "police powers" have consistently been relied upon to validate state interference in the family realm.¹⁷⁸

¹⁷² See *TRIBE*, *supra* note 14, § 15-1, at 302-04.

¹⁷³ See *Malloy*, *supra* note 20, at 1204.

¹⁷⁴ "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. See Marian V. Heacock & Gregory P. Orvis, *AIDS in the Workplace: Public and Corporate Policy*, 13 HARV. J.L. & PUB. POL'Y 689, 694 (1990) (recognizing states' police powers to enforce mandatory testing); *Malloy*, *supra* note 20, at 1193-96 (addressing Tenth Amendment police powers).

¹⁷⁵ See Maia E. Scott, Note, *Tests for Pediatric AIDS: Are We Failing Our Children?*, 3 VA. J. SOC. POL'Y & L. 217, 238 (1995) (noting that a state's interest in this capacity may outweigh constitutional objections if supported by compelling policy considerations).

¹⁷⁶ See *Malloy*, *supra* note 20, at 1210 (evaluating the consideration of the child's best interest to justify mandatory testing).

¹⁷⁷ See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 575 (1985) (5-4 decision) (Powell, J., dissenting) (recognizing the Constitutional limitations on the federal government's interference with states' rights); *Ploughman*, *supra* note 22, at 194; see, e.g., Alexander H. Southwell, Comment, *The County Supremacy Movement: The Federalism Implications of a 1990's States' Rights Battle*, 32 GONZ. L. REV. 417, 474 (1996-97) (discussing violations of the Tenth Amendment for improper infringements on state rights and functions).

¹⁷⁸ See *Goldstein*, *supra* note 10, at 625 (recognizing that "[p]arents ... well-established legal right to make important decisions for their children ... is not absolute"); see also *Viemeister v. White*, 72 N.E. 97, 98 (1904) (providing that the state's police power encompassed the right to preclude the admission of children who were not immunized against highly contagious diseases into the public schools because the State's exercise would promote the public health, safety or welfare).

Additionally, the power of the state to interfere in family decision-making has been bolstered through the application of the doctrine of "*parens patriae*," which allows the state to protect the interests of the child.¹⁷⁹ The "*parens patriae*" doctrine has been applied in a variety of cases in which the need to ensure the child's welfare has been balanced against the privacy rights of the parents.¹⁸⁰ However, application of the doctrine has largely been limited to those instances in which a child's physical or mental health was threatened.¹⁸¹

A final source of state power—the "best interests of the child" doctrine—developed in response to cases where parents refused to allow their child to receive the appropriate, and often-times necessary, medical care.¹⁸² Application of this doctrine requires an initial determination as to whether an identifiable state interest exists to justify intervening on the child's behalf.¹⁸³ If such an interest is found, the court must then determine whether that interest is "sufficiently substantial to outweigh the parents' interest."¹⁸⁴ In performing this analysis the court considers a number of factors including the seriousness of the harm the child is suffering, the potential effectiveness of treatment, the invasiveness of treatment and its effect on the child.¹⁸⁵ Courts have successfully applied the "best interests of the child" doctrine in cases where treatment was necessary to save a child's life.¹⁸⁶ However, the courts have not applied the doctrine where the life of a child was not threatened or the child's condition was

¹⁷⁹ See Goldstein, *supra* note 10, at 625 (discussing the principles of the "*parens patriae*" doctrine).

¹⁸⁰ See *Santosky v. Kramer*, 455 U.S. 745, 766 (1982) (weighing a parent's right to due process against the state's "*parens patriae*" interest in the welfare of the child as applied in the termination of parental rights context); *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944) (holding that the state may infringe upon a parent's constitutional rights under the "*parens patriae*" doctrine if the parent's decision will jeopardize the health or safety of a child).

¹⁸¹ See Goldstein, *supra* note 10, at 627. The Supreme Court has held that the "*parens patriae*" doctrine does not allow a state to interfere unless the child's health is threatened. See *id.*

¹⁸² See *id.* at 627-28 ("[T]he best interests doctrine allows the court discretion to supply its own objective judgment to determine what is in the child's best interest.").

¹⁸³ See *id.*

¹⁸⁴ *Id.* at 628.

¹⁸⁵ See *id.* However, "the underlying consideration is the child's welfare and whether his best interests will be served by the medical treatment." *In re Eric B.*, 235 Cal. Rptr. 22, 27 (Ct. App. 1987) (quoting *In re Phillip B.*, 156 Cal. Rptr. 48, 51 (Ct. App. 1979)).

¹⁸⁶ See Goldstein, *supra* note 10, at 628.

incurable.¹⁸⁷

Any attempt to justify mandatory testing on the basis of these doctrines will prove to be futile, because the legitimacy of these positions is completely undermined when considered in conjunction with mandatory testing of newborns for HIV. First, application of the "police powers" rationale is questionable due to the fact that there is little threat of public transmission through newborns. Newborns are incapable of engaging in high-risk behaviors, such as intravenous drug use or sexual intercourse, which behaviors would pose a threat to the public health. Similarly, the doctrines of "*parens patriae*" and the "best interests of the child" are inapplicable because the administration of HIV treatment is costly, invasive, and ultimately ineffective. Moreover, when a disease is incurable, the ability to prolong an infant's life is an insufficient basis for overriding the parent's wishes regarding testing.¹⁸⁸ As a result, these doctrines cannot justify the invasiveness of mandatory HIV testing.

2. Constitutional Basis for a Ban on Mandatory Testing: The Mother's Right to Privacy

As previously noted, the right to privacy is a multi-faceted one, protecting a variety of activities and information. Mandatory testing infringes upon several aspects of a mother's right to privacy: the right to bodily integrity and autonomy in personal decision-making, the right to make one's own medical decisions, and the right to confidentiality in one's personal medical information. Each of the foregoing components of the privacy right has been specifically afforded protection by this nation's courts.¹⁸⁹

It has been suggested that "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of [the individ-

¹⁸⁷ See *id.* at 628-29.

¹⁸⁸ See *Superintendent of Belchertown State Sch. v. Saikewicz*, 370 N.E.2d 417, 425-26 (Mass. 1977) (stating that "[t]here is a substantial distinction in the State's insistence that human life be saved where the affliction is curable, as opposed to the State interest where ... the issue is not whether but when, for how long, and at what cost to the individual that life may be briefly extended").

¹⁸⁹ See *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (acknowledging an individual's liberty interest in autonomy and bodily integrity); *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261, 278 (1990) (recognizing the right to refuse unwanted medical care as a constitutionally protected "liberty interest"); *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994) (stating that the right to privacy encompasses the right to confidentiality of one's personal medical information).

ual's] own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."¹⁹⁰ This recognition of the right to bodily integrity is linked to the doctrine of informed consent, which requires that the individual be provided with all of the information necessary to enable her to make an informed decision regarding whether or not to pursue specified medical treatment. Mandatory testing of HIV in newborns violates this well established medical doctrine since the mother has no choice regarding her child's testing. Her child will be tested and the test results disclosed to her despite any wishes she may possess to the contrary. In spite of this lack of informed consent, proponents argue that the mother's right to bodily integrity is not directly implicated because the test is not forced upon the mother herself, but rather upon her newborn child. They view mother and child as entirely separate—but such a view is inaccurate in light of the fact that the newborn may retain its mother's antibodies up until the age of eighteen months.¹⁹¹ Medical evidence such as this reveals this distinction as a mere mincing of words, requiring those in favor of testing to ignore the fact that the most commonly used methods of HIV testing are more accurate indicators of the mother's HIV status than that of the newborn.¹⁹²

Moreover, implicit in the right to bodily integrity is the right to refuse medical treatment, a right which should be extended to encompass the right to refuse knowledge of one's HIV status. The decision of whether or not to learn one's own health status, like the decision whether to terminate one's life through the refusal of medical treatment, involves "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy."¹⁹³ Mandatory testing of newborns strips a mother of such "dignity and autonomy"¹⁹⁴ and essentially forces her to submit to medical decisions made by the state on her behalf without consulting her. Yet, the multitude of costs associated with the disease imposes the greatest burden on

¹⁹⁰ *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

¹⁹¹ See Goldstein, *supra* note 10, at 612 n.16. For this reason, after 18 months, 70-80% of infants who initially tested positive for HIV will subsequently test negative. See *id.* (citing John M. Naber & David R. Johnson, *Mandatory HIV Testing Issues in State Newborn Screening Programs*, 7 J.L. & HEALTH 55, 57 (1992-93)).

¹⁹² See Naber, *supra* note 189, at 59.

¹⁹³ *Casey*, 505 U.S. at 851.

¹⁹⁴ *Id.*

the mother, not the state legislatures. As a result, new mothers should be afforded the opportunity "to decline forced disclosure of this information."¹⁹⁵

Additionally, the right not to know can also be derived from the right to confidentiality,¹⁹⁶ which implies a right to non-disclosure in general.¹⁹⁷ If this premise is correct, and it is asserted that it is, violations of the mother's right to confidentiality can occur on two separate levels. First, the disclosure of the newborn's test results to the mother may serve as a violation of confidentiality in and of itself. Case law has established that "direct disclosure by the State to a third party is not a necessary predicate to an invasion of privacy."¹⁹⁸ The recognition of this principle undermines the position of proponents who claim that there is no invasion of privacy because the test results are only revealed to the same person to whom they are confidential.¹⁹⁹ Second, where the mother is absent for whatever reason, the results may be disclosed to the biological father or legal guardian.²⁰⁰ The revelation of the test results to a third party under these circumstances is an undeniable breach of the mother's right to confidentiality. As a result, the mother's decision to remain uninformed of the child's test results should be respected.

3. Practical Considerations Supporting a Ban on Mandatory Testing

Apart from the constitutional dilemmas associated with mandatory testing, there exist various pragmatic considerations that militate against the implementation of such testing regimes. These include: (i) the costs associated with testing and the absence of a guarantee for funding follow-up care; (ii) fear of

¹⁹⁵ Michael L. Closen, *Mandatory Disclosure of HIV Blood Test Results to the Individuals Tested: A Matter of Personal Choice Neglected*, 22 LOY. U. CHI. L.J. 445, 448 (1991).

¹⁹⁶ See Goldstein, *supra* note 10, at 633 (arguing that confidentiality of HIV status as determined by the court in *Doe v. City of New York* implies a woman's right "not to know.").

¹⁹⁷ See *id.*

¹⁹⁸ Curnin, *supra* note 38, at 876. "Simply the taking and recording by state agencies of personal matters is sufficient to infringe individual privacy." *Id.*; see also *Whalen v. Roe*, 429 U.S. 589 (1977); *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, No. 96-16526, 1998 WL 3209 (9th Cir. Feb. 3, 1998); *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570 (3d Cir. 1980).

¹⁹⁹ See Curnin, *supra* note 38, at 877.

²⁰⁰ See *id.* at 878.

discrimination and care avoidance; (iii) the alienation of the mother; (iv) the debatable benefits of early detection and treatment; and (v) the availability of a superior alternative.²⁰¹

i) No Guarantee for Funding

Approximately four million infants were born in the United States in 1994, of that number, approximately 7,000 mothers were HIV-infected.²⁰² Mandatory testing of all infants would require an exorbitant expenditure of funds in order to identify the 1,500-2,000 newborns born HIV positive.²⁰³ While the government has expressed its willingness to provide funding for such testing, it has failed to guarantee any capital for treatment of those infants identified as HIV positive.²⁰⁴ "To surprise unprepared mothers with the doubly traumatic news that they are HIV-positive and their baby may also be" without providing access to funding for treatment is both cruel and irresponsible.²⁰⁵ Thus, this absence of a linkage to treatment further emphasizes the impropriety of a mandatory testing scheme which compels disclosure and all its attendant burdens, without the promise or the hope of any benefits.

ii) Fear of Discrimination Will Result in Avoidance of Care

The knowledge that one is HIV positive brings with it a variety of social implications. Victims of the fatal virus have been subjected to intense discrimination in virtually all aspects of life by those whose fear overshadows their reason.²⁰⁶ In particular, HIV positive individuals have been the victims of discrimination

²⁰¹ See *id.* at 875-76. For a more extensive discussion of these considerations, see *id.* at 875-95.

²⁰² See *Preventing AIDS at Birth*, SACRAMENTO BEE, Mar. 6, 1995, at B6, available in 1995 WL 4103020 (noting that HIV tests cost about twenty five dollars each to administer per pregnant mother).

²⁰³ See Thomas C. Quinn et al., *Early Diagnosis of Perinatal HIV Infection by Detection of Viral-Specific IgA Antibodies*, 266 JAMA 3439 (1991).

²⁰⁴ See Scott, *supra* note 173, at 240 ("Identifying a child as HIV-positive provides only the potential for intervention and treatment, it guarantees neither access to health care nor success.").

²⁰⁵ Curnin, *supra* note 38, at 883.

²⁰⁶ See *id.* at 879. A 1990 survey revealed that 86% of the nation believed that those who contracted AIDS through blood transfusions should be treated with compassion, while less than 50% believed that people who contracted AIDS through homosexual activity should be treated with compassion. Richard A. Knox and Renee Graham, *Most Favor Bigger U.S. Role in AIDS Fight*, BOSTON GLOBE, June 17, 1990, at 1.

in employment, housing, insurance, education (particularly children), and health care.²⁰⁷ Perhaps the most devastating effect of learning that one is HIV positive is the potential for rejection and abandonment of the mother and her newborn by friends and family incapable of showing compassion or sympathy.

It is this threat of isolation and discrimination, which almost inevitably accompanies a positive test result, that will lead many individuals, particularly those who are high-risk, to avoid the health care system altogether if a mandatory testing scheme is implemented.²⁰⁸ Such "care avoidance"²⁰⁹ will ultimately undermine the goals of mandatory testing, placing the lives of the children it intended to benefit in even greater danger because they will receive no medical care at all. Additionally, "care avoidance" will foreclose the potential benefits of counseling aimed at convincing women to submit to HIV testing, because many women will never even enter a hospital's doors let alone speak with someone concerning a very delicate matter.

iii) Alienation of the Mother

"Mandatory testing reflects a policy that ignores the needs and views of the mother."²¹⁰ This failure on the part of the state to recognize the mother's needs and views is counterproductive to her role as a child care provider.²¹¹ Mandatory testing places the mother and her rights in a position inferior to that of the newborn until the mother is needed to provide the care and supervision that the state is incapable of giving. The ultimate success of the testing program, which hinges upon the mother's willingness to cooperate with the state in safeguarding the health of the newborn, is highly unlikely if the rights of the mother are ignored until a time when it is convenient for the state to acknowledge her role.²¹² In fact, mandatory testing's

²⁰⁷ See Curnin, *supra* note 38, at 879-80.

²⁰⁸ See *id.* at 881. " 'Care avoidance' is the term used to describe this unfortunate cycle" that would cause a woman to "shun prenatal care ... rather than risk being exposed." *Id.*

²⁰⁹ *Id.* "This avoidance of prenatal care contributes to America's dismal overall ... infant mortality rates for minorities." Scott H. Isaacman, *Are We Outlawing Motherhood for HIV-Infected Women?*, 22 LOY. U. CHI. L.J. 479, 482 (1991).

²¹⁰ Curnin, *supra* note 38, at 886.

²¹¹ See *id.*

²¹² The State is putting the rights of the mother and the rights of the child in conflict. The issue is not whose rights come first but how both mother and child should be treated as a unit. Improvements in family health care are made, not by

neglect of the mother will likely render the potential benefits associated with early detection unattainable.

iv) Benefits of Early Detection and Treatment Are Debatable

Proponents of mandatory testing contend that it is a necessary solution to a vital problem: allowing for early detection and appropriate care, which will ultimately benefit the newborn. Yet, such advocates tend to exaggerate the benefits of early detection. While testing may improve the infant's quality of life, and may even prolong that life, it cannot prevent the child's ultimate death. Questions invariably arise as to whether the extension of the child's life is in fact a benefit due to the lack of a cure.²¹³ Those in favor of testing assert that it is, in fact, a benefit because it increases the possibility that the child will be alive when a cure is found.

However, the validity of this position is open to attack. There are some who may perceive the extension of the suffering child's life as cruel. They may believe that subjecting the child to aggressive therapy, and the severe psychological consequences associated with the knowledge of their impending death, is the ultimate act of selfishness. Proponents of this view consider the debate from a primarily monetary standpoint. They state that "[u]nless a cure is found, there are no economic benefits to prolonging the life of a child with HIV."²¹⁴

Yet, such a narrow view may be entirely too pessimistic and as such raises a number of ethical and moral considerations incapable of being analyzed in terms of dollars and cents. Unfortunately, there is no definitive answer to this debate and there will not be such an answer until a cure is found. For now, it is up to each individual to ascertain whether mandatory testing is justified on the grounds that it may prolong, but not save, the child's life.

dividing the family unit, but by strengthening the unit. *See id.* at 886 n.159.

²¹³ In one survey conducted in six neonatal intensive care units in New York City, respondent doctors said that even if an HIV test were available, they would withhold treatment because an infected newborn's quality of life is greatly diminished by pain and suffering. *See Betty Wolder Levin, et al., Treatment Choice For Infants in the Neonatal Intensive Care Unit at Risk for AIDS*, 265 JAMA 2976, 2978 (1991).

²¹⁴ Scott, *supra* note 173, at 239.

v) *Availability of a Superior Alternative*

Proponents of mandatory testing tend to overemphasize its purported benefits while ignoring its negative implications. In so doing they have blinded themselves to the application of a superior alternative, namely voluntary testing linked with counseling.²¹⁵ The successful utilization of such programs negates the claims of mandatory testing proponents regarding the inefficacy of voluntary testing. A prime example of a successful counseling and voluntary testing program can be found at Harlem Hospital, which serves a highly concentrated at-risk population.²¹⁶ Counselors at this hospital achieved cooperation rates of more than 90% after advising expectant mothers of the potential benefits of testing and early identification.²¹⁷ Similar successes have been achieved at John Hopkins Hospital in Baltimore, Cooks County Hospital in Chicago, Grady Hospital in Atlanta, and several other sites.²¹⁸

These success rates are indicative of the immense advantages of a voluntary testing scheme. Foremost among these advantages is the overwhelming willingness of pregnant and parturient women to consent to testing when it is voluntary, confidential, and linked to available care and services.²¹⁹ Thus, voluntary testing, which is less invasive than mandatory testing, serves to eliminate the problems associated with care avoidance, dramatically increasing the likelihood that the newborn will receive the appropriate treatment. As one commentator has asserted, "[s]oliciting informed cooperation from the mother, through pre- and post-natal counseling, reduces the likelihood of care avoidance, increases the likelihood of cooperation with test results and follow-up care, avoids alienation of the mother, and maximizes the likelihood of positive, voluntary behavioral change."²²⁰ These enormous benefits clearly indicate that voluntary testing will prove to be the most effective means of achieving the asserted goal of mandatory testing: a reduction in the

²¹⁵ See Curnin, *supra* note 38, at 893.

²¹⁶ See Cooper, *supra* note 20, at 20-22. "[T]he women primarily affected by HIV are likely to be low-income women of color." *Id.* at 20.

²¹⁷ See *id.* at 22 (citing NEW YORK STATE AIDS ADVISORY COUNCIL, REPORT OF THE SUBCOMM. ON NEWBORN HIV SCREENING 6 (1994)).

²¹⁸ For a thorough description of the success rates of these hospitals, see Cooper, *supra* note 20, at 22.

²¹⁹ See *id.* at 22.

²²⁰ Curnin, *supra* note 38, at 894.

transmission of HIV from mother to child.

V. POTENTIAL CONSEQUENCES OF MANDATORY TESTING

As previously noted, the mandatory testing of newborns for the HIV virus raises a number of constitutional, social, and ethical concerns.²²¹ The consequences of validating such testing has the potential to reach far beyond the present and may be used as a precedent for the future restriction of other constitutional liberties. Accordingly, any determination as to the validity of such testing must take into account the rights and liberties that may be imperiled. There are several possible, and disturbing, future scenarios associated with the validation of mandatory testing of newborns for HIV. First, the potential exists for the mandatory loss of child custody by mothers identified as HIV positive. Application of the "best interests of the child" doctrine may lead a state to consider the inevitable demise of the mother and the resulting inability of such parent to care adequately for her child or children as primary factors in removing the children from the home. Loss of custody might also be predicated upon the state's interest in preventing the further transmission of the virus to other members of the mother's family. Such a possibility would contravene the mother's right to autonomy in decision-making protected by the Constitution.

A more troubling possibility is that of the mandatory testing of all pregnant women. The state may ultimately determine that newborn testing is an inadequate means of safeguarding its interests and seek to implement programs mandating testing for all pregnant women. The constitutional infringement of the mother's privacy rights, at issue in the context of newborn testing, would be intensified under such a testing regime. While many might contend that this result is unlikely to occur, there is always the possibility that once the first step is taken the state will not hesitate to continue down that road by imposing further restrictions.

Moreover, if mandatory testing of pregnant women were validated, it could provide the impetus for an even greater intrusion into the mother's life. Using the same logic, a state or the federal government might advocate forced abortions, forced sterilization or the possible criminal prosecution of mothers

²²¹ See *supra* notes 140-51 and accompanying text.

guilty of transmitting the HIV virus to their infants. If these measures ever became reality, a woman's rights with respect to her reproductive freedom would be entirely abrogated, as would over twenty years of case law dedicated to the development of those rights. Under these circumstances "[t]he government would be 'protecting' the child in the odd sense that it would be preventing it from being born, despite its seventy percent chance of being uninfected."²²² Although these are severe and unlikely scenarios, the logic underpinning the impetus for mandatory testing would also support such measures.

Our Constitutional history is indicative of our hatred of tyranny, suppression, and restriction. Americans have always viewed governmental systems employing such methods with distrust and repugnance. If we hope to avoid living with the reality of such measures, we must resist the implementation of mandatory HIV testing for newborns. Failure to do so could propel us into a world reminiscent of that described by Orwell where:

There was ... no way of knowing whether you were being watched at any given moment. How often, or on what system, the Thought Police plugged in on any individual wire was guesswork. It was even conceivable that they watched everybody all the time You had to live—did live, from habit that became instinct—in the assumption that every sound you made was overheard, and, except in darkness, every movement scrutinized.²²³

This leaves us with one final question to ponder: Do we want BIG BROTHER watching us?

Kellie E. Lagitch

²²² Martha A. Field, *Pregnancy and AIDS*, 52 MD. L. REV. 402, 416-17 (1993).

²²³ GEORGE ORWELL, 1984, at 6-7 (1949).

